LEE COPY No. 814

Office - Supreme Court, U.S.
FILED
JAN 21 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

G. J. LUCCHESE, ET AL.,
Petitioners,

vs.

GUS B. MAUERMANN,
Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI

CARL WRIGHT JOHNSON
NAT L. HARDY
San Antonio 5, Texas,
Attorneys for Respondent

BEN S. MORRIS, CITY ATTORNEY,
San Antonio 5, Texas,
Of Counsel

INDEX

Subject Index

Pages

STATEMENT OF THE CASE 1-4

CONTENTIONS OF PETITIONERS 5

CONTENTIONS OF RESPONDENT 6

POINTS AND AUTHORITIES 6-15

Point No. I.

The Court of Civil Appeals did not hold that the stipulations of the parties in causes Nos. 11,619 and 11,620 were binding on petitioners and did not base its judgment on any such stipulations 6

Point No. II.

That said ordinances which attempted to annex Olmos Park and Terrell Hills were in fact void. That this was apparent from the evidence and the findings of the trial court in this case and such void ordinances were subject to collateral attack 8

Point No. III.

That the City of San Antonio, through its officers and attorneys, had the right and authority to confess error and abandon its appeal in said quo warranto suits (Nos. 11,619 and 11,620) 9

Point No. IV.

The validity of the election of September 25, 1945, was properly upheld regardless of whether or not the annexation ordinances were void 13

CONCLUSION AND PRAYER 15

Carpenters Will, 40 NYS (2) 13 12

Chaffee v. Granger, 6 Mich. 51 10

City of Fayetteville v. Parrish, 110 Fed. (2) 902..... 12

City of Galvan Park v. City of Houston,
113 S. W. (2) 162..... 9

City of Houston v. City of Magnolia Park 276 S. W. 685 9

City of San Antonio v. Strumberg,
70 Tex. 366, 7 S. W. 754 12

Clark v. W. L. Pearson & Co. Tex. C.C.A.
26 S.W. (2) 382 10

Colegrove v. John Hancock Mut. Life Ins. Co.
(Mo.) 153 S.W. (2) 750 12

Hector Coolseat v. City of Veblin, Sup. Ct. S. Dakota,
226 N.W. 726, 67 A.L.R. 1499 10

Hunt v. Atkinson, 12 S.W. (2) 412 9

Kelley v. Town of Milan, 127 U.S. 139, 32 L. ed. 77,
8. S. Ct. 1101 11

Salt Lake City v. Salt Lake Investment Co.
43 Utah, 181, 134 Pac. 607 10

Seals v. State ex rel Matthews, Sup. Ct. Ala, 51 So. 337.... 15

State ex rel Davis v. Huggins, Sup. Ct. Okla.
230 Pac. 716 15

Sweet v. Denver & R. G. RR. Co. 59 Colo. 131,
147 Pac. 669 10-11

Town of Griffin Park v. City of Port Arthur,
36 S.W. (2) 593 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

G. J. LUCCHESE, ET AL.,
Petitioners,

vs.

GUS B. MAUERMANN,
Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, in their brief, adopt as the statement of the case the statement contained in the petition for certiorari denominated "Statement of the Matter Involved." This statement begins by saying that there are no controverted issues of fact in the points presented, but the statement as made by petitioners contains so many over-statements, loose generalities and points of misplaced emphasis that it does not contain a true statment of the facts involved.

In the first paragraph, petitioners assert that the City of San Antonio "annexed the adjacent areas of Terrell Hills and Olmos Park." A little farther on, it is stated that "petitioners conclusively established in the trial court that at least 933 qualified electors resided in the annexed areas of Terrell Hills

and Olmos Park just prior to and on September 25, 1945." And it is further stated that "respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio." These statements are not true.

The trial court found that the City of San Antonio "attempted" to annex the territory constituting the cities of Terrell Hills and Olmos Park. (Findings No. 11-15, R. 20-21) The findings of the trial court further show that at the time of such attempted annexation, both Terrell Hills and Olmos Park were duly incorporated cities or towns of less than 5,000 inhabitants; that each had a duly elected, qualified and acting Mayor; that neither had ever in any way consented to be annexed to the City of San Antonio, but that they had at all times resisted said attempted annexation and had brought legal proceedings to declare said annexation ordinances invalid, which legal proceedings were pending at the time of the election herein contested and at the time of the trial of this election contest. (Findings 12-16, R. 20-21) These findings by the trial court are sufficient to show that the attempted annexation of these two incorporated towns was in fact void.

The findings of the trial court further showed that these two incorported towns which were attempted to be annexed by the City of San Antonio constituted Bexar County voting precincts Nos. 170 and 176 (Findings 13-17, R. 21-22). The trial court found that a total of 933 persons in said two election precincts had either voted in the election of November, 1944, upon exemption or had paid their poll taxes and were on the Bexar County Tax Collector's list of poll tax payers and were also upon either the property assessment rolls for the State and County, or upon the City assessment rolls, or both, but the Court further found "there was no actual evidence that any of said persons actually resided in said precincts on September 25, 1945, or were at that time

otherwise qualified to vote in such precinct in said election." (Findings 14-18, R. 21-22)

The findings of the trial court are that while no election officers were appointed for holding elections in such precincts in the September 25, 1945, bond election, but that there was no evidence of any request on the part of the voters living in such precincts that such election be held and no evidence that any one offered to, or would have voted in such election in said precincts, or that any one was denied the right to vote therein. (Finding 19, R. 22)

In the statement, and throughout petitioners' brief, the judgments of the Court of Civil Appeals in Causes No. 11,-619 and No. 11,620, are referred to as "agreed judgments," and it is charged that the decision of the Court of Civil Appeals in such cases was based upon stipulations of the parties to said suits, and that they did not constitute a judicial determination of the matters involved, and that these judgments were obtained by collusion between the appellants and the appellees in said suits.

These statements are not supported by the record. The Court of Civil Appeals causes numbers 11,619 and 11,620 were quo warranto suits brought in the name of the State of Texas for the purpose of testing the validity of the ordinances by which the City of San Antonio attempted to annex the town of Olmos Park and the town of Terrell Hills. These suits were regularly tried in the district court, all issues being fully contested, and the judgment of the district court was adverse to the City of San Antonio. The City of San Antonio had the right to appeal, though it was under no compulsion to do so, and it elected to exercise this right. The Court of Civil Appeals had jurisdiction to review only the proceedings of the trial court upon specific assignments of error to be set up by the appellant, City of San Antonio.

In the absence of such specific assignments or points of

error, no action could be taken by the Court of Civil Appeals other than to affirm the judgment of the trial court. Instead of filing assignments of error, the City of San Antonio, through its counsel, admitted in the Court of Civil Appeals, by its motion to affirm judgment, that the final judgment entered by the trial court was correct. There was no agreement or stipulation whatsoever concerning this matter, and it is upon this admission that the affirmance of the judgments of the trial court in these two cases is based by the Court of Civil Appeals. In addition, the City of San Antonio requested that the wording of the judgment as entered by the trial court be amended so as to use the specific languge that the ordinance in each case "was and is null and void and of no valid force or effect." Counsel for the two towns involved agreed and consented in writing that the judgments entered by the trial court in the two cases might be so modified. (R. 58 and 60) There was no other stipulation involved in the proceedings. The Court of Civil Appeals was of the opinion that the proposed amendment of the wording of the judgments in no manner changed the legal effect of said judgments. (Motions to Reform and Affirm. R. pp 56, 58, 59 & 61) This is apparent from the following brief quotation from the opinion:

> "It would be difficult to select more suitable or stringent language to accomplish the purpose of rendering the two annexation ordinances wholly nugatory than that employed by the trial court in these cases.
>
> "We are therefore of the opinion that a conclusion that the ordinances were and are wholly void is necessarily implied from the provisions of the judgments. No theory within the frame work of the pleading other than that of the voidness of the annexation ordinances will support the decrees rendered. Consequently, we see no valid objection to here stating explicitly a conclusion which is necessarily implied by the judgments rendered in the trial court." (R. 72-73)

CONTENTIONS OF PETITIONERS

That petitioners, in their brief state five separate specifications of error, but they all relate to substantially the same matters of fact and points of law and are argued jointly by petitioners in their brief. These points may be summarized as follows:

(a) That the Court of Civil Appeals, in its judgment and opinion, in causes Nos. 11,619 and 11,620, held that the stipulations and agreements of the parties to said two suits were binding upon petitioners who were not parties to said suits.

(b) That the Court of Civil Appeals in said causes Nos. 11,619 and 11,620, based its judgment upon agreements and stipulations of the parties to said suits as to the unconstitutionality of the annexation ordinances.

(c) That the Court of Civil Appeals, in the present suit, held that the voters residing in the annexed areas involved in the quo warranto suits, causes Nos. 11,619 and 11,620, in the Court of Civil Appeals, were properly not permitted to vote in the bond issue election in the City of San Antonio because of a void judgment in said causes Nos. 11,619 and 11,620, predicated on agreements and stipulations by the parties to said other suits as to a constitutional question.

(d) That it was beyond the power of the respondent and the officials of the City of San Antonio to enter into such stipulation and agreement and that the Court of Civil Appeals was in error in not regarding the same.

(e) That the foregoing action of the Court of Civil Appeals was erroneous and deprived petitioners of their property in denial of due process of law as guaranteed by the Fourteenth Amendment.

CONTENTIONS OF RESPONDENT

Respondent contends as follows:

(a) That the Court of Civil Appeals did not hold that the stipulations of the parties in Causes Nos. 11,619 and 11,620 were binding on petitioners and did not base its judgment on any such stipulations.

(b) That said ordinances which attempted to annex Olmos Park and Terrell Hills were in fact void. That this was apparent from the evidence and the findings of the trial court in this case and such void ordinances were subject to collateral attack.

(c) That the City of San Antonio, through its officers and attorneys, had the right and authority to confess error and abandon its appeal in said quo warranto suits (Nos. 11,619 and 11,620).

(d) The validity of the election of September 25, 1945, was properly upheld regardless of whether or not the annexation ordinances were void.

POINTS AND AUTHORITIES

I.

The Court of Civil Appeals did not hold that the stipulations of the parties in causes Nos. 11,619 *and* 11,620 *were binding on petitioners and did not base its judgment on any such stipulations.*

The elaborate statement of purported facts contained in petitioners specifications of error and elsewhere in their brief conceal rather than reveal the true state of the record with reference to the judgments entered in the two quo warranto suits by the Court of Civil Appeals (Nos. 11,619 and 11,620.) These quo warranto suits were fully litigated in the trial

court and judgment was rendered holding the two annexation proceedings invalid and permanently enjoining the City of San Antonio from attempting to exercise any authority over the territory attempted to be annexed. (R. 71) The City appealed from these judgments. The Court of Civil Appeals found that "the judgments rendered by the trial court seem entirely appropriate to the type of suit and subject matter involved. Said judgments are supported by the pleadings and *are free from fundamental error.*" It then became necessary for the City to attack said judgments by specific assignments or points of error, if it could do so. Otherwise, the Court of Civil Appeals could do nothing but affirm the judgments. The City apparently finding itself unable to produce sound assignments of error attacking said judgments, filed its motion in each case admitting that the final judgment entered by the trial court was correct, and asking for the affirmance of said judgments without further delay. The same result would have been reached if the City had failed to file a brief in the Court of Civil Appeals, or if it had filed a brief and had failed to show sound reasoning for setting the judgments of the trial court aside.

The only effect of filing the motion for affirmance apparently was in the time in which the judgment of the Court of Civil Appeals was rendered. The motion on behalf of the City to affirm was not a stipulation or an agreement with the opposite parties. The City further requested a reformation of the wording of the judgment by the inclusion of the express words declaring said ordinances void. The appellees in said suits endorsed on said motion their agreement and consent that the wording of the final judgment entered by the trial court might be modified by including express words declaring the ordinances involved to be void.

The Court of Civil Appeals stated that it was of the opinion that a conclusion that the ordinances were wholly void

was necessarily implied from the provisions of the judgment of the trial court. Therefore they had no objection to modifying the judgment so as to include the express words. We have previously quoted their exact language in this respect. (See page 5 of this brief.)

There was no fraud or collusion involved in these proceedings whatsoever. Petitioners charged that the judgments in the Court of Civil Appeals in Causes Nos. 11,619 and 11,620 were the result of collusion, but collusion necessarily involves the idea of a secret agreement for a wrongful purpose, or a secret arrangement between persons to defraud another, or to obtain an unlawful object through legal proceedings. No facts are pointed out by petitioners which would in any way tend to show any fraud or collusion in this matter. On the contrary, the record affirmatively shows that the entire matter was handled openly and in accordance with customary and sound legal practice.

II.

That said ordinances which attempted to annex Olmos Park and Terrell Hills were in fact void. That this was apparent from the evidence and the findings of the trial court in this case and such void ordinances were subject to collateral attack. (p.6)

The record shows that upon the trial of the present case, it was proved, and the trial judge found, that the City of Terrell Hills and the City of Olmos Park were each, at the time of their attempted annexation by the City of San Antonio, a duly incorporated city or town of less than 5,000 inhabitants; that each had a duly elected, qualified and acting mayor, and that neither of said cities had in any way consented to be annexed by the City of San Antonio, but had at all times and were still resisting said attempted annexation and that at the time of the trial of this suit, legal proceedings

had been instituted by each of said towns to declare said annexation ordinances invalid and said legal proceedings were pending at the time of the trial of this suit.

The last Federal Census shows the City of San Antonio to be a city of more than 250,000 population. The attempts of one incorporated city to annex the territory of another incorporated city has been the source of considerable litigation in the State of Texas, and the courts of this state have held, and it is now the settled law of this state, that the only authority in the law of this state authorizing one municipal corporation to annex another municipal corporation, is Article 1265 R.C.S., 1925, Texas. *Town of Griffin Park* v. *City of Port Arthur*, 36 *S. W.* (2) 593 (*loc. cit.* 595)

Article 1265 applies only to cities and towns with a population of 100,000 or more and not over 150,000 according to the last Federal Census. The attempt made by the City of San Antonio to annex Terrell Hills and Olmos Park was by simple ordinance only and was not an attempt to comply with Article 1265, or any other provision of the Constitution and Laws of the State of Texas. Under the Charter of the City of San Antonio, unincorporated territory could be annexed by simple ordinance, but there is no provision under the Constitution and Laws of the State of Texas by which the City of San Antonio could annex the territory of another duly incorporated city or town by simple ordinance or otherwise, without the consent of said other incorporated city or town. *Hunt* v. *Atkinson*, 12 S. W. (2) 412; *City of Galvan Park* v. *City of Houston*, 113 S. W. (2) 162; *City of Houston* v. *City of Magnolia Park*, 276 S. W. 685.

III.

That the City of San Antonio, through its officers and attorneys, had the right and authority to confess error and

abandon its appeal in said quo warranto suits (Nos. 11,619 and 11,620). (p. 7 this brief)

The City of San Antonio had the full legal and moral right to abandon its appeal of the quo warranto suits and to admit that the trial court had reached the correct result in such litigation. From petitioners' argument, it can be implied that their position is that when a Municipal corporation once gets into litigation, that it is powerless to bring it to a close until it has obtained a judgment from the court of last resort having jurisdiction of the cause, after contesting the matter at every step. This would be an absurdity. There is no justification for a municipality to continue expensive litigation after it has determined that such litigation cannot be won. For that reason, it is universally held that a municipal corporation can bind itself by a judgment by confession, or by agreement. The limitations upon a city's authority to agree to a consent judgment are equally well settled. A municipality may consent to or confess a judgment against itself in the absence of fraud or collusion if the obligation assumed by the municipality is just and one which by law its officers have a right to assume on behalf of the municipality. *Hector Coolseat* v. *City of Veblin, Sup. Ct. So. Dakota,* 226 N. W. 726, 67 A.L.R. 1499; *Clark* v. *W. L. Pearson & Co.*, Tex. C.C.A., 26 S. W. (2) 382; *Sweet* v. *Denver & R. G. RR Co.* 59 Colo. 131, 147 Pac. 669; *Chaffee* v. *Granger,* 6 Mich. 51; *Salt Lake City* v. *Salt Lake Investment Co.,* 43 Utah, 181, 134 Pac. 607.

In the last cited case, the Court said:

> "Municipal corporations are bound by the acts of their attorneys precisely the same as private corporations or individuals would be. In the absence of fraud or collusion on their part, attorneys have power to bind their clients, including municipal corporations, by consenting to judgments or decrees."

And in Sweet v. Denver & R. G. RR Co., supra, the Supreme Court of Colorado said:

> "We have yet to learn that there is any iniquity in consenting to a judgment upon just and valid obligations, whether by an individual on his own account, or by a managing board on account of a municipality."

Of course, the judgments in Causes Nos. 11,619 and 11,620 complained of by petitioners, did not in any manner create any obligation against the City of San Antonio. Neither did it impose any obligation or cast any burden on petitioners. The cases cited by petitioners in their brief, such as Kelley v. Town of Milan, 127 U. S. 139, 32 L. ed. 77, 8. S. St. 1101, have no application whatever to the situation such as we have here. In that case, the Town of Milan had issued negotiable bonds to be used in payment of stock in a railroad company. The town had no authority under the laws of the State of Tennessee to issue such bonds. Consequently, the Mayor and Aldermen had no authority to enter a consent decree against the city holding said bonds to be valid and enforcible. If the City had no authority under the law to execute and negotiate such bonds by its regular municipal machinery, it could not accomplish the same result by consenting to a judicial decree to that effect. The other authorities cited in petitioners' brief with reference to the agreed judgments which held general laws to be unconstitutional, of course, have no application to the present suit whatsoever. No general law was held unconstitutional by the Court of Civil Appeals in the quo warranto cases. There is no finding that the so-called annexation ordinances were unconstitutional. They were merely declared to be void and therefore not accomplishing the annexation of Olmos Park and Terrell Hills to San Antonio, or in giving even color of legality to such attempted annexation.

Petitioners make no attempt to point out any action or

omission on the part of the governing authorities of the City of San Antonio with reference to said two quo warranto suits which would constitute a fraud upon petitioners, or any other citizens of said city. They charge that the judgments in the quo warranto suits were obtained by collusion, but no fact is shown which would show collusion. Collusion has been judicially defined many times and its most common judicial definition is that collusion means an agreement to defraud a person of his rights by forms of law, or to obtain an object forbidden by law. *Carpenters Will*, 40 N.Y.S. (2) 13, (loc. cit. 17); *Colegrove* v. *John Hancock Mutual Life Ins. Co.* (Mo.) 153 S. W. (2) 750 (loc. cit. 752); *City of Fayetteville* v. *Parrish*, 110 Fed. (2) 902 (loc. cit. 908)

Petitioners were not residents of the territory involved in the annexation ordinances. They do not show that they owned any property in such territory and under the record here before the Court, their rights and interests in such matter of the two quo warranto suits were no different from the rights and interests of every other citizen and taxpayer of the City of San Antonio. They had no peculiar right in having attempted annexation of this territory sustained and they were not threatened with some damage peculiar to themselves by the failure of such annexation proceedings. Therefore, petitioners were not in a position to demand that they be heard on the appeal of the annexation quo warranto suits and they had no right to demand the continuation of the appeal, and they were denied no due process of law by the confession of error on the part of the City of San Antonio.

It is a well established principle of law in this State that no action lies in favor of an individual to restrain an interference with a mere public right and such suits cannot be maintained by an individual who has not suffered or is not threatened with some damage peculiar to himself. *City of San Antonio* v. *Strumberg*, 70 Tex. 366, 7 S.W. 754.

Justice Gaines, in the opinion in the case just cited, says that

> "individuals have a right to sue for a redress of their own private injuries, but for such as affect all the public alike, an individual is not the representative of the public interest."

We have searched diligently through the long petition for certiorari and brief in support of the same, filed by the petitioners herein, and we have not been able to find even an assertion that the ordinances which attempted to annex Olmos Park and Terrell Hills to the City of San Antonio were in fact valid. It is not even contended that they were merely voidable only. Unless Petitioners could show here that the judgment and opinion of the Court of Civil Appeals holding that these ordinances were void was contrary to law, then no showing has been made that any right petitioners have has in any way been invaded or that they are entitled to any sort of judgment other than that which has been rendered herein by the Court of Civil Appeals after full hearing, and which has been given the approval of the Supreme Court of Texas by its adverse action upon petitioners' application for writ of error.

IV.

The validity of the election of September 25, 1945, was properly upheld regardless of whether or not the annexation ordinances were void. (p. 7, this brief)

The trial court, in the present case, made proper findings supported by adequate testimony to sustain the election without expressing the legal conclusion that the said annexation ordinances were void.

The trial court, because of the pendency of the quo warranto suits, did not deem it necessary to determine the issues which were involved in the quo warranto suits. However,

when the case was decided in the Court of Civil Appeals, that Court, in view of the unquestionable invalidity of the annexation ordinances, did not find it necessary to discuss the other findings and conclusions of the trial court which would compel the affirmance of the judgment of the Court below. The Supreme Court of Texas denied petitioners' application for writ of error because the same was without merit.

The trial Court, found that there was no evidence showing that any of the persons referred to in petitioners' pleading actually resided in the respective cities on the date of the election, or were at that time otherwise qualified to vote in said election. (Finding 18, R. 22)

The trial court found that while no machinery was provided for elections in said cities, there was no evidence of any request to hold such election in said cities and no evidence that any one offered to or would have voted in said election in said cities, and no evidence that any one was denied the right to vote therein, or any attempt made to hold an election in said cities. (Finding 19, R. 22).

That the City of San Antonio had never assessed for taxation any property situated in the territory of Olmos Park or Terrell Hills and could not in any event do so prior to June 1, 1946. (Finding 20, R. 22-23)

The trial court concluded as a matter of law that the inhabitants of the cities of Terrell Hills and Olmos Park were not qualified electors in the Special Municipal election held on September 25, 1945. (Conclusion of Law 6, R. 24) That as a matter of law, without regard to the merits of the attack upon the validity of the annexation ordinances of July 25, 1945, attempting to annex the cities of Terrell Hills and Olmos Park in no event would the inhabitants of such cities be eligible to vote in the election of September 25, 1945, because, among other reasons, they had not resided within the corporate limits of the City of San Antonio for six months

immediately preceding said election. *State ex rel Davis* v. *Huggins* (Sup. Ct. Okla.), 230 Pac. 716; *Seals* v. *State ex rel Matthews* (Sup. Ct. Ala.) 51 So. 337.

CONCLUSION AND PRAYER

This was an election contest and the burden was on the petitioners to show that the results of the election as declared by the proper election authorities were invalid. This they wholly failed to do. The judgments of the trial court and the Court of Civil Appeals are in all things correct and proper. The Petitioners have wholly failed to show that their rights were in any way invaded by the action of the Texas Courts and they have wholly failed to show that there is any federal question presented by this record.

Respondent calls to the attention of this Court that this litigation is delaying the commencement of a substantial program of public works in which the public has considerable interest. That if this delay continues much longer, the City of San Antonio will lose the use of large sums of money allocated to it in aid of such public works by the State and Federal Governments. That because of this situation, the respondent respectfully requests an early disposition of this application.

WHEREFORE, respondent prays that the petition for writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, be in all things denied.

Respectfully submitted,

CARL WRIGHT JOHNSON

NAT L. HARDY

San Antonio 5, Texas,

Attorneys for Respondent

BEN S. MORRIS, CITY ATTORNEY,

San Antonio 5, Texas,

Of Counsel